

EXHIBIT B

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

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5 THE KROGER CO., :

6 PLAINTIFF, :

7 -VS- : CASE NO.: C-1-02-439

8 MALEASE FOODS CORP., :

9 DEFENDANT.:

10 - - -

11 Deposition of JONATHAN D. LIBBERT, CPA,
12 CFE, a witness herein, taken by the defendant as
13 upon cross-examination pursuant to the Federal
14 Rules of Civil Procedure, and pursuant to agreement
15 and stipulations hereinafter set forth at the
16 offices of Frost, Brown & Todd, LLC, 2200 PNC
17 Center, 201 East Fifth Street, Cincinnati, Ohio at
18 1:48 p.m. on Wednesday, March 3, 2004, before
19 Britney L. Fisher, a notary public within and for
20 the State of Kentucky.

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<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES:</p> <p>2 On behalf of the Plaintiff:</p> <p>3 Douglas R. Dennis, Esq.</p> <p>4 and</p> <p>5 Scott D. Phillips, Esq.</p> <p>6 of</p> <p>7 Frost, Brown & Todd, LLC</p> <p>8 2200 PNC Center</p> <p>9 201 East Fifth Street</p> <p>10 Cincinnati, Ohio 45202</p> <p>11 On behalf of the Defendant:</p> <p>12 Robert W. Cinque, Esq.</p> <p>13 of</p> <p>14 Cinque & Cinque, P.C.</p> <p>15 845 Third Avenue</p> <p>16 New York, New York 10022</p> <p>17 - - -</p> <p>18 STIPULATIONS</p> <p>19 It is stipulated by and between counsel</p> <p>20 for the respective parties that the deposition of</p> <p>21 JONATHAN D. LIBBERT, CPA, CFE, a witness herein,</p> <p>22 may be taken as upon cross-examination pursuant to</p> <p>23 the Federal Rules of Civil Procedure, and pursuant</p> <p>24 to agreement; that the deposition may be taken in</p>	<p style="text-align: right;">Page 3</p> <p>1 stenotypy by the notary public-court reporter and</p> <p>2 transcribed by her out of the presence of the</p> <p>3 witness; that the jurisdiction of the notary</p> <p>4 public-court reporter is waived; and that the</p> <p>5 transcribed deposition is to be submitted to the</p> <p>6 witness for his examination and signature, and that</p> <p>7 signature may be affixed out of the presence of the</p> <p>8 notary public-court reporter.</p> <p>9 - - -</p> <p>10 INDEX</p> <p>11 WITNESS CROSS-EXAMINATION</p> <p>12 Jonathan D. Libbert, CPA, CFE 4</p> <p>13 - - -</p> <p>14 EXHIBITS</p> <p>15 DEPOSITION EXHIBITS MARKED</p> <p>16 Y, report of Mr. Libbert. 5</p> <p>17 - - -</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>
<p style="text-align: right;">Page 4</p> <p>1 (Witness sworn.)</p> <p>2 JONATHAN D. LIBBERT, CPA, CFE</p> <p>3 of lawful age, a witness herein, being first duly</p> <p>4 sworn as hereinafter certified, was examined and</p> <p>5 deposed as follows:</p> <p>6 CROSS-EXAMINATION</p> <p>7 BY MR. CINQUE:</p> <p>8 Q. Mr. Libbert, who engaged you on</p> <p>9 behalf of Kroger?</p> <p>10 A. The law firm of Frost, Brown & Todd.</p> <p>11 Q. Which person in the law firm?</p> <p>12 A. It's been a while, I believe it may</p> <p>13 have been Mr. Phillips.</p> <p>14 Q. Is this the first time you've done</p> <p>15 any work with Mr. Phillips' law firm?</p> <p>16 A. No.</p> <p>17 Q. How many times have you done work</p> <p>18 with the Frost, Brown firm?</p> <p>19 A. Probably four or five times.</p> <p>20 Q. And you're receiving a fee of \$175</p> <p>21 per hour; is that correct?</p> <p>22 A. Yes, at the time I was engaged. We</p> <p>23 update that the first of the year each year.</p> <p>24 Q. Well, how much?</p>	<p style="text-align: right;">Page 5</p> <p>1 A. \$190.</p> <p>2 Q. Bargain. How much have you billed so</p> <p>3 far?</p> <p>4 A. It's been pretty minimal. I didn't</p> <p>5 bring the billing records, but my guess would be</p> <p>6 six, eight hours.</p> <p>7 Q. And in connection with the</p> <p>8 preparation of your report, which I happen to have</p> <p>9 here, we'll mark that as our next exhibit.</p> <p>10 (Deposition Exhibit Y was marked for</p> <p>11 identification.)</p> <p>12 BY MR. CINQUE:</p> <p>13 Q. Okay. This is your report, correct?</p> <p>14 A. Yes.</p> <p>15 Q. Who typed it?</p> <p>16 A. I did.</p> <p>17 Q. So that's your Word processor?</p> <p>18 A. Yes.</p> <p>19 Q. All right. And did you review any</p> <p>20 documents in connection with this report?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. What did you look at?</p> <p>23 A. Well, it's stated right here in my</p> <p>24 report I reviewed the complaint, the sale lease</p>

<p style="text-align: right;">Page 6</p> <p>1 back document, and that there were other items that 2 were furnished to me. 3 (Mr. Phillips left the room.) 4 Q. Okay. Now, you state here on the 5 second page or the page with your opinions if the 6 lease for the San Marcos property had been renewed 7 under normal business conditions, basically the 8 rent would have been substantially higher, et 9 cetera. Do you see that? 10 A. Yes. 11 Q. Did you review the lease? 12 A. I believe I did. 13 Q. You believe you did or did you? 14 A. Well, there's a complete copy of my 15 file that's here, we can look at the file. 16 Q. I want to know what you remember? 17 A. I believe that I did. 18 Q. Okay. And what did you determine 19 when you reviewed the lease with respect to this 20 finding? 21 A. There was what I call the original 22 sublease under the renewal for that sublease, that 23 the monthly rent was a little bit over \$8,200 per 24 month.</p>	<p style="text-align: right;">Page 7</p> <p>1 Q. Okay. And, therefore, what did you 2 conclude? 3 A. That beginning April 1st of 2003 4 there was an additional agreement between Kroger 5 and the H.E. Butt Company that provided for the 6 payment of \$48,125 per month. 7 Q. Okay. So that's almost a reduction 8 of 50 percent, correct? 9 A. It's probably about 40 percent. 10 Q. Okay. 11 A. I think it's closer to 50, but my 12 arithmetic may be wrong. 13 Q. And what was the reason for that 14 reduced rent? 15 A. It was my understanding that this was 16 in recognition of, I'll call it, the deal to sell 17 the property not being able to be closed. 18 Q. What's the basis of your 19 understanding. 20 A. The basis was conversations with 21 people from Kroger. 22 (Mr. Phillips entered the room.) 23 Q. Which people? 24 A. Primarily Ed Waldvogel.</p>
<p style="text-align: right;">Page 8</p> <p>1 Q. What did he tell you? 2 A. He told me that was the reason why 3 they reduced the rent. 4 Q. What did he say? 5 A. I think I just answered that. 6 Q. You can answer it again. I don't 7 know that I heard your answer entirely, but go 8 ahead. 9 A. He said that's the reason the rent 10 was reduced, because as it states right here on the 11 document failure -- decrease in rent due to failure 12 to close. 13 Q. So you're basing your opinion on 14 information that Waldvogel gave you; is that 15 correct? 16 A. Well, I did review the documents 17 myself as well. 18 Q. Okay. And did your review of the 19 documents furnish you with any information that you 20 used in your conclusion? 21 A. Well, it was a result of all of the 22 work that I've done, both the conversation and the 23 review of the documents. 24 Q. Okay. Is there anything in the</p>	<p style="text-align: right;">Page 9</p> <p>1 document that led you to believe that the reason 2 the rent was reduced was dependency of the 3 transaction? 4 A. I would have to go back and look at 5 the document. 6 Q. Go ahead. 7 THE WITNESS: Do we have it here? 8 MR. PHILLIPS: Yeah. 9 THE WITNESS: Are these the 10 documents from my file? 11 MR. DENNIS: I think so. 12 THE WITNESS: I don't see the 13 document I'm looking for here. 14 (Mr. Phillips left the room.) 15 BY MR. CINQUE: 16 Q. What document are you looking for? 17 A. I'm looking for the document that was 18 the agreement effective April 1st, 2003. 19 Q. Is that something that you looked at 20 to form the basis for your conclusion about the 21 reduction in rent? 22 A. That was one of the documents that I 23 looked at, yes. 24 Q. You don't have it here?</p>

3 (Pages 6 to 9)

Page 10

1 A. I don't see it here.

2 **Q. Okay. The annual threshold rate that**
3 **you reflect on your report, did you put those**
4 **quotations around threshold?**

5 A. Yes.

6 **Q. Why did you do that?**

7 A. That's the terminology that Mr.
8 Waldvogel used.

9 **Q. What does it mean?**

10 A. Well, it can mean a couple of
11 different things.

12 **Q. What did it mean to you in your**
13 **report?**

14 A. The rate that was used here was an
15 attempt to kind of hit the middle ground between
16 what Kroger would use when they invested the money
17 to build new properties, and the rates that they
18 were paying on current debt.

19 **Q. Twelve percent, is that what you're**
20 **saying?**

21 A. That's the number that's on this
22 piece of paper.

23 **Q. I'm trying to understand. Explain**
24 **the relationship between the so-called threshold**

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1 A. I think both. I think somebody gave
2 it to me and it was in the documents.

3 **Q. And who's that someone, Waldvogel?**

4 A. Yes.

5 **Q. Now, the \$11 million figure, what**
6 **does that represent?**

7 A. I was told that was the selling price
8 of the warehouse in San Marcos, Texas.

9 **Q. Did you factor in any income tax**
10 **consequences in any of these calculations?**

11 A. No.

12 **Q. So the way you did this is you**
13 **assumed that, if it sold for \$11 million, Kroger**
14 **would have the \$11 million available for**
15 **investment; is that correct?**

16 A. Yes.

17 **Q. Why didn't you consider income tax**
18 **consequences?**

19 A. I didn't think it was appropriate.

20 **Q. And what made you not think it was**
21 **appropriate?**

22 A. If Kroger had been able to sell this
23 warehouse when they thought they were going to,
24 they would have had the \$11 million in cash. And

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1 **rate and any calculations to which it applies?**

2 A. Well, once again, the 12 percent is
3 sort of the middle ground between what Kroger
4 normally would achieve in investing new money,
5 which I believe is around 18 percent.

6 **Q. So you're basing your conclusion on**
7 **the fact that invariably when Kroger has money to**
8 **invest, it earns a yield of what?**

9 A. Well, they have told me it was 18
10 percent.

11 **Q. Did you do anything to independently**
12 **verify that?**

13 A. Not at this time.

14 **Q. Okay. Now, you use the figure \$11**
15 **million, do you see that?**

16 A. Yes.

17 **Q. Where did you get that figure?**

18 A. I believe that was from a document
19 for the sale of that property. I believe there
20 were three different properties in the sale
21 agreement, and each price was spelled out
22 separately.

23 **Q. Did somebody give you that number or**
24 **did you find it somewhere?**

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1 they would have been able to invest that money or
2 to pay off the existing debt.

3 **Q. And when was this money to be**
4 **available to Kroger as you've just described it?**

5 A. I believe it would have been some
6 time around April 1st of 2003.

7 **Q. And we're sitting here in the**
8 **beginning of March of 2004, are there any income**
9 **tax consequences involved in the receipt of that**
10 **\$11 million, as you sit here today?**

11 A. I'm not a tax expert, but I'm sure
12 there would be.

13 **Q. Okay. You didn't factor in anything**
14 **for income tax one way or the other, correct?**

15 A. That's correct.

16 **Q. In your experience has Kroger ever**
17 **lost any money on any investment its ever made?**

18 A. I've never had any previous dealings
19 with Kroger.

20 **Q. So what is your assumption then that**
21 **Kroger would have earned how much on \$11 million,**
22 **is it 12 percent?**

23 A. Yes, it is.

24 **Q. Okay. And that's based simply upon**

4 (Pages 10 to 13)

<p style="text-align: right;">Page 14</p> <p>1 the discussion you had with Waldvogel, correct?</p> <p>2 A. Primarily, yes.</p> <p>3 MR. CINQUE: All right. That's all</p> <p>4 I have for the witness.</p> <p>5 MR. DENNIS: Okay.</p> <p>6 MR. CINQUE: Thank you.</p> <p>7</p> <p>8</p> <p>9</p> <p>10 JONATHAN D. LIBBERT, CPA, CFE</p> <p>11 - - -</p> <p>12 DEPOSITION CONCLUDED AT 2:03 P.M.</p> <p>13 - - -</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p style="text-align: right;">Page 15</p> <p>1 CERTIFICATE</p> <p>2 STATE OF KENTUCKY:</p> <p>3 : SS</p> <p>4 STATE AT LARGE :</p> <p>5 I, BRITNEY L. FISHER, the undersigned, a duly</p> <p>6 qualified and commissioned notary public within and</p> <p>7 for the State of Kentucky, do hereby certify that</p> <p>8 before the giving of his aforesaid deposition, the</p> <p>9 said JONATHAN D. LIBBERT, CPA, CFE was by me first</p> <p>10 duly sworn to tell the truth, the whole truth and</p> <p>11 nothing but the truth; that the foregoing is the</p> <p>12 deposition given at said time and place by the said</p> <p>13 JONATHAN D. LIBBERT, CPA, CFE; that said deposition</p> <p>14 was taken in all respects pursuant to agreement;</p> <p>15 that said deposition was taken by me in stenotypy</p> <p>16 and transcribed by computer-aided transcription</p> <p>17 under my supervision; that the transcribed</p> <p>18 deposition is to be submitted to the witness for</p> <p>19 his examination and signature; that I am neither a</p> <p>20 relative of nor attorney for any of the parties to</p> <p>21 this cause, nor relative of nor employee for any of</p> <p>22 their counsel, and have no interest whatever in the</p> <p>23 result of the action.</p> <p>24</p>
<p style="text-align: right;">Page 16</p> <p>1 IN WITNESS WHEREOF, I hereunto set my hand</p> <p>2 and official seal of office at Cincinnati, Ohio,</p> <p>3 this day of , 2004.</p> <p>4</p> <p>5</p> <p>6</p> <p>7 MY COMMISSION EXPIRES: BRITNEY L. FISHER</p> <p>8 JULY 3, 2005. NOTARY PUBLIC-STATE OF</p> <p>9 KENTUCKY</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p style="text-align: right;">Page 17</p> <p>1 UNITED STATES DISTRICT COURT</p> <p>2 SOUTHERN DISTRICT OF OHIO</p> <p>3 WESTERN DIVISION</p> <p>4 THE KROGER CO., : PLAINTIFF,;</p> <p>5 -VS- : CASE NO. C-1-02-439 MALESE FOODS CORP., : DEFENDANT.;</p> <p>6</p> <p>7 Britney L. Fisher, a court reporter, first</p> <p>8 duly cautioned and sworn, testifies and affirms</p> <p>9 that JONATHAN D. LIBBERT, CPA, CFE, a witness</p> <p>10 herein, was notified that the transcript was ready</p> <p>11 for review and signature on Wednesday, March 17,</p> <p>12 2004 2004, by forwarding a copy of the transcript</p> <p>13 to Mr. Scott Phillips, Esq.</p> <p>14</p> <p>15 Within thirty-one days (pursuant to Rule</p> <p>16 (30)E of the Federal Rules of Civil Procedure),</p> <p>17 JONATHAN D. LIBBERT, CPA, CFE, a witness herein,</p> <p>18 did not present signature of said deposition.</p> <p>19 The original transcript is now being</p> <p>20 tendered into the hands of Mr. Robert W. Cinque,</p> <p>21 Esq.</p> <p>22 Further affiant sayeth naught.</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p> <p>29</p> <p>30</p> <p>31</p> <p>32</p> <p>33</p> <p>34</p> <p>35</p> <p>36</p> <p>37</p> <p>38</p> <p>39</p> <p>40</p> <p>41</p> <p>42</p> <p>43</p> <p>44</p> <p>45</p> <p>46</p> <p>47</p> <p>48</p> <p>49</p> <p>50</p> <p>51</p> <p>52</p> <p>53</p> <p>54</p> <p>55</p> <p>56</p> <p>57</p> <p>58</p> <p>59</p> <p>60</p> <p>61</p> <p>62</p> <p>63</p> <p>64</p> <p>65</p> <p>66</p> <p>67</p> <p>68</p> <p>69</p> <p>70</p> <p>71</p> <p>72</p> <p>73</p> <p>74</p> <p>75</p> <p>76</p> <p>77</p> <p>78</p> <p>79</p> <p>80</p> <p>81</p> <p>82</p> <p>83</p> <p>84</p> <p>85</p> <p>86</p> <p>87</p> <p>88</p> <p>89</p> <p>90</p> <p>91</p> <p>92</p> <p>93</p> <p>94</p> <p>95</p> <p>96</p> <p>97</p> <p>98</p> <p>99</p> <p>100</p> <p>101</p> <p>102</p> <p>103</p> <p>104</p> <p>105</p> <p>106</p> <p>107</p> <p>108</p> <p>109</p> <p>110</p> <p>111</p> <p>112</p> <p>113</p> 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